United Nations AT/DEC/1160

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1160

Case No. 1202: KHANAL Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Mohan Prasad Khanal, former staff member of the United Nations Population Fund (hereinafter UNFPA), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 May 2001 and thereafter until 30 September 2001;

Whereas, on 29 June 2001, the Applicant filed an Application, requesting the Tribunal, inter alia:

"5. ...

(3) to order the Respondent to pay the Applicant damages in the amount of one year of net salary for denial of due process;

(4) to overturn the separation from service and order that the Applicant be reinstated by UNFPA; or to order that the Applicant be paid three years base salary in lieu of reinstatement;

(5) if the Administrative Tribunal orders that the Applicant be reinstated by UNFPA, to also order that:

(a) the Applicant be paid retroactively for the period from 15 August 2000 until the date of reinstatement;

(b) the period from 15 August 2000 until the date of reinstatement be treated as special leave with pay;

(6) to order the Respondent to pay the Applicant damages in the amount of one year of net salary for emotional suffering, financial hardship and damage to his reputation".

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 31 October 2002;

Whereas the Respondent filed his Answer in on 31 October 2002;

Whereas, on 25 July 2003 the Tribunal decided to postpone consideration of this case until its autumn session.

Whereas the facts are as follows:

The Applicant entered the service of UNFPA on a fixed-term contract at the G-5 level as Senior Clerk (Accounts), Kathmandu, Nepal Country Office, on 23 March 1981. His contract was subsequently converted to permanent status commencing 1 December 1986. At the time of the events that gave rise to the Application he held the position of Finance Assistant, G-6 level.

On 8 October 1999, the Applicant and four other staff members, all of whom were employed in the UNFPA Nepal Country Office as members of its Procurement Committee, wrote to the Chief, Office of Oversight and Evaluation, UNFPA Headquarters, expressing their concern about alleged irregularities and violations of procurement rules and procedures existing at their office. They held the UNFPA Representative responsible, maintaining that they had been coerced into compliance with the alleged improprieties. They also requested that an investigation be conducted.

Thereafter, the Office of Audit and Performance Review (OAPR), United Nations Development Programme (UNDP), constituted a special audit team on 10 November 1999, "to perform auditing and forensic work on the procurement activities, including construction works and other procurement activities" undertaken by the UNFPA Office in Nepal. The report of the special audit team concluded that there was evidence of unsatisfactory conduct on the part of the Applicant, and recommended that disciplinary action be initiated. The Applicant was charged with failure to adhere to the financial regulations and rules regarding vendor payments, as well as neglecting to report non-compliance with the financial rules and regulations, "thus depriving UNFPA Headquarters the possibility of exercising its supervisory control authority on these procurement activities which led to major financial losses to the organization". The Applicant was provided with a copy of the report on 18 February 2000 and informed

that failure to provide satisfactory explanations would result in his case being submitted to the Disciplinary Committee. The Applicant was requested to provide his comments by 6 March. The Applicant responded on 23 February, insisting that he had acted on written instructions from other staff members, and that the one instance of a double payment being processed was accidental and was refunded by the vendor in question during a reconciliation in December 1998, well before the arrival of the special audit team.

On 28 June 2000, the UNFPA Representative, *a. i.*, advised the Applicant that he was being suspended from duty with pay, with immediate effect. He was informed that certain audiotaped conversations involving himself, and two other staff members, as well as a statement that he had collected bribes, were considered to have established "*prima facie* evidence of serious misconduct on [his] part, and corroborate through other witnesses [his] active participation in a bribery scheme, as well as in other violations of the most basic standards of conduct, financial rules and procedures". The Applicant was invited to respond to these additional allegations by 18 July. The Applicant denied the allegations on 17 July, claiming that the audiotaped conversation had no legal standing as it had been secretly and "illegally" recorded, "with malicious intent", by someone who was not a "designated investigating authority". He further asserted that the tape had been distorted "by taking some statements or cutting and pasting statements here and there to harm my integrity and create a fiction". The Applicant requested that his case be submitted to the Disciplinary Committee if his explanation was found to be insufficient for his suspension to be withdrawn. The Officer-in-Charge of UNDP responded on 15 August 2000, stating, in relevant part,

> "On the legality of the evidence, with or without the tape recording, there are many witnesses corroborating your conversation during this ... meeting. You admit yourself to having participated in that meeting, and you never denied the substance of the discussion that took place, including a recognition that you had benefited from bribes. In the Organization's view, the tape recording together with other evidence constitutes valid and sufficient proof of the tenor of a conversation that everyone admits took place. On the so-called "investigative" purpose of this meeting, and whether your statements have been distorted or not, it has been observed that your admission of receiving bribes was candid, spontaneous, and without duress or reservations. As an aggravating circumstance in your case, it was found that on many occasions you systematically concealed from the UNDP approving officers the irregularities which you know were taking place in the procurement and payment processes for the construction projects, and which you had the duty to disclose to them.

> For the above reasons, it has been decided to reject as untrustworthy your explanations of 23 February and 17 July 2000 on the various charges made against you, and ... it has been decided to summarily dismiss you from service under Staff Regulation 10.2, effective on the date of receipt of this letter.

On 13 October 2000, the Applicant filed an appeal to the *ad hoc* Disciplinary Committee (AHDC). During the course of the proceedings, a video conference was arranged to be held in Bangkok in order to enable the Applicant and his counsel to cross examine the Administrative Assistant who had remained in Kathmandu. The Administrative Assistant could not be located and the conference nevertheless proceeded in his absence. The AHDC submitted its report on 23 November. Its findings and conclusions read, in part, as follows:

> "... **THE FINDINGS, INDICATING WHICH OF THE ALLEGATIONS, IF ANY, APPEAR TO BE SUPPORTED BY THE EVIDENCE**
>
> *Charge (A) [Processing of payments to vendors prior to delivery of services]*
>
> ... The Committee found the evidence that [the Applicant] was instrumental in processing payments to vendors prior to delivery of services too weak and, therefore, did not find him guilty as charged.
>
> *Charge (B) [Keeping cheques in the office safe until services had been rendered]*
>
> The Committee accepted the defendant's contention, that he handed cheques prepared by him for the payment of services to the Administrative Assistant ... and that it was outside of his control, when those payments were made to vendors. As under charge (A), the Committee found the evidence presented by the Administration about [the Applicant's] role in this process too weak and, therefore, did not find him guilty as charged.
>
> *Charge (C) [Processing of double payment]*
>
> The double payment took place and was not contested by the defendant. However, the Committee felt, since the action was corrected immediately, long before the audit of irregularities started, and was not repeated, that this charge should not lead to disciplinary action, but should be considered as an act of negligence, and thus performance related.
>
> *Charges (D) and (E) [Participating in bribery scheme, and failing to report the planned bribes to headquarters or to another competent authority; and, participating in a meeting in March 2000,.... confirming his involvement in a bribery scheme and his attempt to foster a new scheme with [the Representative], involving UNFPA construction projects]*
>
> The Committee felt that charges (D) and (E) should be dealt with together, relating to the same taped evidence. Recognizing the representation made by the defence counsel about the quality of the tape transcript, the Committee still felt that there was sufficient evidence to surmise the existence of a bribery scheme in operation from which [the Applicant] benefited. Therefore, the Committee found [the Applicant] guilty of **serious misconduct** under charge

(D). Regarding charge (E), the committee found that there was insufficient evidence to prove that [the Applicant] was actively attempting to foster a new scheme with [the Representative], involving UNFPA construction projects.

Charge (F) [Concealing from UNDP approving officers the irregular procurement and payment practices]

The Committee felt, acknowledging that [the Applicant] was in an inferior position and in addition sidelined through internal office arrangements, that he could have been more forthcoming to draw the attention of competent authorities, e.g. the approving officers at UNDP, to the irregularities as he had perceived them already during the early stage of the construction project. The Committee found him guilty of **unsatisfactory conduct** regarding this charge.

...

... ADVICE OF THE AD HOC DISCIPLINARY COMMITTEE TO THE ADMINISTRATOR

After careful review of the evidence on record and counter-evidence submitted by the staff member and mitigating factors, the Ad Hoc Disciplinary Committee concludes that [the Applicant] is guilty of serious misconduct for his participation in the bribery scheme... and for unsatisfactory conduct by failing to draw the attention of approving officers at UNDP on the irregularities that he had perceived. Consequently, and taking into account the mitigating circumstances of this case, the Committee recommends that [the Applicant] be separated from service, effective 14 August 2000, with compensation."

On 21 December 2000, Administrator, UNDP, transmitted a copy of the report to the Applicant and informed him as follows:

"...

I have carefully reviewed this case once again, in light of the Disciplinary Committee report where I observe that it finds you guilty of serious misconduct on the charge of bribery, and of unsatisfactory conduct on other charges of financial irregularities. As a result, the members of the Disciplinary Committee have recommended that [your] separation from service be maintained, with compensation.

After giving full consideration to all the facts and circumstances of this case, and consulting with the Executive Director of UNFPA, I have decided to accept the unanimous recommendation of the Disciplinary Committee, and to maintain your separation from service with 3 months of salary in lieu of notice, and with half the termination indemnity provided for by annex III(c) of Staff Regulations."

On 16 February 2001, the Applicant requested the Administrator UNDP for a review of the decision to dismiss him. By letter dated 11 May 2001, the Administrator advised him that the decision stood.

On 29 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant was a scapegoat for the irregularities committed by the Representative.

2. The Applicant's rights of due process were violated throughout. In particular, he was not given a copy of the audit report or his statements to the auditors and he was not notified of the charges against him; he was convicted based upon an inaccurate transcript; and, he did not have an opportunity to cross-examine a key witness against him.

3. The punishment imposed on the Applicant was disproportionate.

4. The Applicant suffered embarrassment and economic hardship because of the publicity UNFPA gave the case.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct warranting summary dismissal or misconduct warranting disciplinary sanctions. The decision to summarily dismiss the Applicant was a valid exercise of that discretionary authority.

2. The Applicant was accorded due process. The contested decision were in no way vitiated by substantive or procedural irregularity, and the Administration acted correctly in presenting new allegations to the Applicant.

3. The decision was not vitiated by bias, improper motivation, or other extraneous factors.

4. The penalty imposed was not disproportionate to the offence.

The Tribunal, having deliberated on 25 July 2003 in Geneva and from 12 to 21 November 2003 in New York, now pronounces the following Judgement:

I. The Applicant submits his Application to challenge a decision of the Respondent finding the Applicant guilty of serious misconduct for "participation in a bribery scheme" and for unsatisfactory conduct for "failing to draw the attention of approving officers at UNDP on the irregularities that he had perceived".

II. As to the misconduct alleged, the Respondent's case against the Applicant is based almost entirely upon a tape of a meeting that occurred in March 2000, which the Applicant and a number of other staff members attended. By his own admission, the Applicant attended the March 2000 tape-recorded meeting, stating his reasons for attending as follows:

> "I was asked by the Administrative Assistant to come to his place to see written evidence to prove [the Representative's] fabrication of documents and of [the Representative] instructing the Administrative Assistant to collect commission payments. He also said that he was not feeling well and had not slept for a number of days. Hence, whatever I have said was not Statement of Facts; it was to elicit evidence from the Administrative Assistant and sympathize with his family members ..."

Based on that tape, the Respondent alleges that the Applicant admitted to having "benefited from bribes". As is apparent from Judgement No. 1153, *Poudel* (2003), rendered at the Tribunal's current session, the Tribunal is unwilling to act on the basis of the tape-recording in question, because of numerous evidentiary insufficiencies; most notably, the tape is in Nepalese, a language in which the Tribunal has no fluency; cogent and substantial criticisms have been made in relation to both the adequacy and accuracy of the transcript of the tape and of the translation of the transcript, and the Tribunal is unable to assess for itself the validity of those criticisms; and, the man who allegedly taped the meeting of March 2000, the Administrative Assistant, never presented himself for video testimony at the AHDC hearing and was thus unavailable for cross-examination. The reply made by the Applicant, in response to the allegation that the tape recording captured him admitting to having participated in the bribery scheme, was insufficient to constitute admissions or to overcome the deficiencies by virtue of the evidentiary shortfalls of the tape. This case differs substantially from *Poudel* in that, when the Applicant was confronted by the evidence on the tape, he, unlike Mr. Poudel, made no incriminating admission. Accordingly, the Tribunal is not satisfied that there was sufficient evidence before the AHDC to justify its finding that the Applicant participated in a bribery scheme, and, therefore, the Tribunal rejects the finding that the Applicant was guilty of serious misconduct.

III. As to the finding of unsatisfactory conduct, the Tribunal firstly wishes to emphasize the peculiar language used by the AHDC in making its finding. The AHDC concluded:

> "The Committee felt, acknowledging that [the Applicant] was in an inferior position and in addition sidelined through internal office arrangements, that he could have been more forthcoming to draw the attention of competent authorities, e.g. the approving officers at UNDP, to the irregularities as he had perceived them already during the early stage of the construction project. The Committee found him guilty of unsatisfactory conduct regarding this charge."

From any point of view, the AHDC's finding is remarkable for its vagueness, tentativeness and what appears to be an intentional lack of clarity. The phrase "willing to wound, but afraid to strike" comes immediately to mind. The AHDC fails to identify with clarity what were alleged to be the Applicant's obligations or to identify findings of fact giving rise to the AHDC's conclusions. It provides few concrete facts of the sort one would expect to find to justify having imposed the ultimate penalty. The AHDC's findings as to the charge of unsatisfactory conduct also is couched in such terms of mitigation and excusing circumstances that it is difficult to measure the gravity intended by the findings made. The AHDC, in fact, appears to have accepted the Applicant's explanations that he had made attempts to report irregularities to the Representative, as such explanations are cited under the heading in the AHDC report, "Any aggravating or mitigating factors that might be relevant". As the Applicant's explanations, in defense of any alleged irregularities, cannot be seen as aggravating circumstances, they necessarily must be mitigating factors, and the AHDC appears to have accepted these explanations as such. Certainly, the Tribunal must perceive them as accepted by the AHDC, because the AHDC did not reject them.

IV. The Tribunal notes that the initial decision to summarily dismiss the Applicant without any benefits was changed to separation from service with three months salary in lieu of notice and that he was paid half the termination indemnity provided for by the Staff Regulations. The Tribunal, in all circumstances, is not satisfied that there is sufficient evidence to sustain the AHDC's findings of either serious misconduct or unsatisfactory performance of a type which would justify disciplinary sanction.

V. For the foregoing reasons, the Tribunal orders the rescission of the decision of the Respondent to dismiss the Applicant, but if the Respondent decides that in the interest of the Organization no further action shall be taken in the Applicant's case, the Tribunal orders the Respondent to pay to the Applicant an amount equal to six months net base salary at the time of his dismissal, in addition to the payments already made.

VI. All other pleas are rejected.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 21 November 2003

Maritza **Struyvenberg**
Executive Secretary